

BURSOR & FISHER, P.A.
L. Timothy Fisher (State Bar No. 191626)
2121 North California Blvd., Suite 1010
Walnut Creek, CA 94596
Telephone: (925) 482-1515
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com

BURSOR & FISHER, P.A.
Scott A. Bursor (*pro hac vice*)
369 Lexington Avenue, 10th Floor
New York, NY 10017
Telephone: (212) 989-9113
Facsimile: (212) 989-9163
E-Mail: scott@bursor.com

BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER, LLP
Alan R. Plutzik (State Bar No. 077785)
Michael S. Strimling (State Bar No. 96135)
2125 Oak Grove Road, Suite 120
Walnut Creek, CA 94598
Telephone: (925) 945-0200
Facsimile: (925) 945-8792
E-Mails: aplutzik@bramsonplutzik.com
mstrimling@bramsonplutzik.com

Attorneys for Defendants Power
Ventures, Inc. and Steve Vachani

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a
California corporation; POWER VENTURES, INC.
a Cayman Island Corporation, STEVE VACHANI,
an individual; DOE 1, d/b/a POWER.COM, an
individual and/or business entity of unknown nature;
DOES 2 through 25, inclusive, individuals and/or
business entities of unknown nature,

Defendants.

Case No. 5:08-CV-05780 JW

**DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO FACEBOOK
INC.'S MOTION TO ENLARGE
TIME PURSUANT TO CIVIL
LOCAL RULE 6-3 AND 16-12**

Defendants Power Ventures, Inc. (“Power”) and Steve Vachani (“Vachani”) respectfully submit this memorandum of points and authorities in opposition to Facebook, Inc.’s Motion to Enlarge Time Pursuant to Civil Local Rule 6-3 and 16-12.

I. INTRODUCTION

Nearly eleven months ago on August 19, 2010, this Court issued a scheduling order setting forth the pre-trial deadlines in the case including the discovery and motion cut-offs. *See* Dkt. No. 92. Since the Court issued its order, Facebook has done little work to prepare the case for trial. In October, 2010, Facebook served document requests and interrogatories on defendant Power. For the next seven months, Facebook did virtually nothing else. It did not file a motion, take a deposition, serve any discovery or contact defendants about the supposed deficiencies in their discovery responses. Only after defendants filed a motion for summary judgment on May 6, 2011 did Facebook wake up and begin to litigate this case again.

Now, Facebook disingenuously attempts to blame defendants for the fact that it is not ready for trial and asks this Court to extend all of the deadlines set forth in the August 19, 2010 Scheduling Order by 60 days and to continue the hearing on defendants’ motion for summary judgment from September 19 to October 24. Notably absent from Facebook’s motion is any acknowledgement that it sat on its hands for more than seven months and did nothing to get this case ready for trial. The Court should not absolve Facebook of its neglect and should deny the motion.

II. ARGUMENT

Facebook must establish “good cause” for its request to modify the pre-trial schedule set forth in the Court’s August 19, 2010 Scheduling Order. FRCP 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”). In *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992), the Ninth Circuit held that the “good cause” standard primarily considers the “diligence” of the party seeking to modify the schedule. *Id.* at 609. Facebook has utterly failed to satisfy the diligence requirement.

A. Facebook Did Not Diligently Litigate This Case

Facebook attempts to establish good cause for extending the deadlines in the August 19, 2010 scheduling order by blaming defendants for not cooperating in the discovery process. Facebook carefully avoids mentioning that it did no work on this case for more than seven months.¹ Facebook served document requests and interrogatories on October 22, 2010. *See* Exh. A to the Chatterjee Decl. Defendants responded to those discovery requests on December 15, 2010. *See* Exh. B to the Chatterjee Decl. Facebook did not raise any issue with those responses until May 12, 2011. *See* Exh. E to the Chatterjee Decl. In fact, the docket shows that Facebook's only substantive activity in the case from the time the Court issued its scheduling order on August 19, 2010 until the beginning of May, 2011 was to stipulate to the dismissal of five of its claims on February 18. *See* Dkt. No. 97. Other than that, Facebook did nothing. Only after defendants filed their motion for summary judgment on May 6 did Facebook come out of hibernation and claim that there were any problems with defendants' discovery responses. Thereafter, defendants engaged in extensive meet and confer efforts that led to the filing of a joint report with Magistrate Judge Lloyd on July 7. *See* Exhs. A-D to the Fisher Decl. and Exhs. E-H to the Chatterjee Decl.; *see also* Dkt. No. 113 (joint report).² There has been no lack of diligence on defendants' part. It is Facebook that sat on its hands and did not litigate this case diligently.

B. Defendants Have Not Refused to Provide a Witness for Deposition

Facebook claims that defendants have refused "to provide a witness for deposition." Facebook's Motion at 2. That is simply not true. As the following chronology shows, defendants have diligently worked to provide dates for the depositions.

¹ In a desperate effort to explain its neglect, Facebook says that it "saw no benefit to expending resources on this case when it appeared Power was not in business and settlement was possible." Facebook's Motion at 3, fn. 2. Defendants took the deposition of Facebook employee Craig Clark on February 17. Shouldn't that have indicated to Facebook that Power was in business and prepared to litigate the case? Facebook also could have picked up the phone and called defendants' counsel if it wanted to find out what Power intended to do. Facebook's "we thought the case was going to settle" excuse simply does not fly.

² On June 2 and 3, Facebook served defendants with additional document requests. After Facebook refused defendants' request for a one week extension of time due to the 4th of July holiday, defendants responded to those requests on a timely basis on July 5. The parties are in the process of meeting and conferring regarding those responses.

- On June 1 and June 6, Facebook served deposition notices for defendants Power and Vachani. Exhs. E and F to the Fisher Declaration.
- On June 13, defendants' counsel informed Facebook that it had failed to comply with Local Rule 30-1 and that defendants were unavailable on the dates noticed. Exh. G to the Fisher Declaration.
- On June 21, defendants offered July 7 for the depositions. Exh. H to the Fisher Decl.
- Facebook responded that its counsel Neel Chatterjee was unavailable that day and asked for additional dates. Exh. I to the Fisher Decl.
- On June 22, defendants offered July 7, 15, 18 and 19 for the depositions. Exh. J to the Fisher Declaration.
- Mr. Chatterjee responded that he was on vacation from July 18 through July 28 and asked to "move this to August." Exh. K to the Fisher Decl. During a meeting on June 22, Facebook's counsel specifically requested dates for the deposition in the last week of August. Fisher Decl. at ¶ 12.
- On July 1, defendants' counsel responded that the dates proposed in August were unavailable and offered additional dates in July. Exh. D to the Fisher Decl ("Defendants previously proposed 7/7, 7/15, 7/18 and 7/19. Other than 7/15, those dates are still available. Mr. Vachani is also available on 7/12 (all day) and 7/13 (a.m. only). Please let us know if you can take the depositions on any of those dates.").
- On July 5, Facebook agreed to take the deposition on July 12. Exh. L to the Fisher Decl.
- On July 7, defendants' counsel informed Facebook that they were working with their client to confirm the July 12 deposition. Exh. M to the Fisher Decl.
- On July 8, Facebook decided not to take the deposition on July 12 and instead requested additional dates for the deposition. Exh. N to the Fisher Decl.

Defendants have made every effort to work with Facebook to schedule the depositions.

The parties are in the process of resolving the scheduling issues and defendants anticipate that the depositions will be scheduled shortly. Facebook's claim that defendants have "refused" to provide witnesses for depositions is simply baseless and without merit.

C. Defendants Have Actively Engaged in the Meet and Confer Process

Facebook also criticizes defendants for refusing "to engage in any meaningful discussions to resolve the parties' discovery disputes." Facebook's Motion at 3. The evidence does not support that contention. Defendants responded fully and completely to Facebook's belated meet and confer requests. *See* Exhs. A, B and D to the Fisher Decl. Any disputes regarding Power's

December 15, 2010 responses could have been resolved long ago had Facebook simply raised those issues on a timely basis. Defendants are not to blame for Facebook's inattention to the case.

D. The Courts Should Not Postpone the Hearing on Defendants' Summary Judgment Motion

Facebook also requests that the Court postpone the hearing on defendants' motion for summary judgment from September 19 to October 24. Defendants filed their motion for summary judgment on May 9. With the hearing set for September 19, Facebook had 142 days notice of defendants' motion and four months to prepare a response. In addition, defendants did not file their motion at the outset of the case. The case was filed in December, 2008 and is already more than 30 months old. Facebook had plenty of time to muster whatever evidence it had to respond to defendants' motion. If Facebook is unprepared to respond to the motion, it is due solely to Facebook's own negligence.

III. CONCLUSION

It is not this Court's responsibility to bail out a party who by its own admission failed to litigate its claims. Facebook admits that it did nothing in this case for more than six months on the mistaken belief that the case was going to settle or Power would go out of business. Facebook has known about the deadlines in this case for nearly 11 months. During most of that time, Facebook did nothing to prepare this case for trial. The Court should deny Facebook's motion to enlarge time.

Dated: July 11, 2011

BURSOR & FISHER, P.A.

By _____ /s/
L. Timothy Fisher

L. Timothy Fisher (State Bar No. 191626)
2121 North California Blvd., Suite 1010
Walnut Creek, CA 94596
Telephone: (925) 482-1515
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com

Scott A. Bursor (*pro hac vice*)
369 Lexington Avenue, 10th Floor
New York, NY 10017-6531
Telephone: (212) 989-9113

Facsimile: (212) 989-9163

E-Mail: scott@bursor.com

Alan R. Plutzik (State Bar No. 77785)

Michael S. Strimling (State Bar No. 96135)

2125 Oak Grove Road, Suite 120

Walnut Creek, CA 94598

Telephone: (925) 945-0200

Facsimile: (925) 945-8792

E-Mail: aplutzik@bramsonplutzik.com

mstrimling@bramsonplutzik.com

Attorneys for Defendants Power

Ventures, Inc. and Steve VachanI